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6 Attorneys for LaSalle National Bank as Trustee

7 **UNITED STATES BANKRUPTCY COURT**  
8 **DISTRICT OF ARIZONA**

9 In re:

10 **LEEWARD HOTELS, L.P., an Arizona**  
11 **limited partnership,**

12 **Debtor.**

In Proceedings under Chapter 11

Case No. B-99-09162-ECF-GBN

**SECURED LENDER'S OBJECTION TO**  
**RETENTION OF WARNICK & COMPANY**  
**AS EXPERT FOR THE DEBTOR**

14 LaSalle National Bank, in its capacity as Trustee for the registered holders of DLJ Mortgage  
15 Acceptance Corporation Commercial Mortgage Passthrough Certificates Series 1997-CF1, as serviced  
16 by Lennar Partners, Inc. (the "Secured Lender"), objects to the Debtor's 'Petition for Authority to  
17 Retain Warnick & Company as Expert for the Debtor,' filed on May 3, 2000 (the "Retention"), for the  
18 same reasons as the Secured Lender objected to the "substitution" of its feasibility witness as attempted  
19 by the Debtor's "Notice of Substitution of Expert Witness," filed with the Court on April 24, 2000 (the  
20 "Substitution"), purporting to "substitute" Kevin Holt of Warnick & Company for Michael Straneva of  
21 Ernst & Young. In support of its Objection to the Retention, the Secured Lender respectfully directs the  
22 Courts attention to the "Secured Lender's Objection to Substitution of Expert Witness," filed April 25,  
23 2000, a true copy of which is attached hereto as Exhibit A.

26 Additionally, the Secured Lender notes that Exhibit "B" to the Retention is an engagement letter  
27 agreement between Warnick & Company and Kilburg Hotels, LLC, the general partner of the Debtor,  
28 date **April 19, 2000**. The Substitution was not filed until April 24, 2000, and the Retention was not filed

1 until May 3, 2000. The undue delay in retaining a “substitute” expert witness (an improper substitution  
2 as the Secured Lender has already pointed out to the Court) is additionally prejudicial to the Secured  
3 Lender, who has now only until May 31, 2000 to conduct discovery with respect to one of the Debtor’s  
4 most important putative expert witnesses. This delay is unfair and should preclude the Debtor from  
5 being able to retain Warnick & Company at this late stage.  
6

7 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2000.

8 SQUIRE, SANDERS & DEMPSEY, L.L.P.

9  
10 By: /s/ Jordan A. Kroop

11 Thomas J. Salerno

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17 this 3rd day of May, 2000, to:

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**Exhibit A**

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7 **UNITED STATES BANKRUPTCY COURT**  
8 **DISTRICT OF ARIZONA**

9 In re:

10 LEEWARD HOTELS, L.P., an Arizona  
11 limited partnership,

12 Debtor.

In Proceedings under Chapter 11

Case No. B-99-09162-ECF-GBN

**SECURED LENDER'S OBJECTION TO  
SUBSTITUTION OF EXPERT WITNESS**

13  
14 LaSalle National Bank, in its capacity as Trustee for the registered holders of DLJ Mortgage  
15 Acceptance Corporation Commercial Mortgage Passthrough Certificates Series 1997-CF1, as serviced  
16 by Lennar Partners, Inc. (the "Secured Lender"), objects to the Debtor's "substitution" of its feasibility  
17 witness as set forth on the Debtor's "Notice of Substitution of Expert Witness," filed with the Court on  
18 April 24, 2000 (the "Substitution"), purporting to "substitute" Kevin Holt for Michael Straneva. The  
19 Debtor should not now be given a second opportunity to name a putative expert witness well after the  
20 Court-imposed deadline simply because the Debtor failed to ensure that its first designated witness was  
21 not precluded from testifying.  
22

23 In accordance with the terms the "Stipulated Order Establishing Schedule in Advance of Joint  
24 Hearing to Consider Confirmation of Competing Plan of Reorganization," dated March 16, 2000 (the  
25 "Stipulated Order"), the "Debtor's Initial List of Witnesses and Exhibits," filed on April 10, 2000 (the  
26 "Debtor's List") was a *final designation* of expert witnesses. The Stipulated Order is clear that no expert  
27 witness not already identified on the Debtor's List may be called to testify in these proceedings.  
28

1 The Debtor's List designated Michael Straneva, of E&Y Kenneth Leventhal Real Estate Group  
2 ("E&Y"), as a witness, without designating Mr. Straneva (or any other witness) as an expert. Based on  
3 the Substitution, it now appears as though the Debtor intended that Mr. Straneva testify as an expert  
4 witness. When the Debtor designated Mr. Straneva, the Debtor had obviously not investigated whether  
5 Mr. Straneva could serve as a witness in these proceedings and had not determined whether Mr.  
6 Straneva was "disinterested" for purposes of his engagement as a professional in these proceedings.  
7

8 Had the Debtor done so, however, it would have discovered that Mr. Straneva was precluded  
9 from serving as the Debtor's witness in these proceedings in light of a direct conflict that exists by virtue  
10 of E&Y's long-standing and ongoing professional services for Lennar Partners, the special servicer for  
11 the Secured Lender in these proceedings. The Debtor subtly intimates in the Substitution that Lennar  
12 Partners somehow "claimed" this conflict at the last minute, only after the Debtor had designated Mr.  
13 Straneva as a witness. This is not true. Rather, the conflict was immediately apparent to both Mr.  
14 Straneva and Lennar Partners the moment the Debtor named Mr. Straneva as a witness adverse to  
15 Lennar Partners in these proceedings. This is a direct conflict of interest that would have virtually leapt  
16 out at all parties had the Debtor investigated the matter (or ostensibly informed Mr. Straneva of the  
17 adverse parties) before the Debtor submitted the Debtor's List.<sup>1</sup> It is not Lennar Partners' fault that Mr.  
18 Straneva is precluded from testifying in these proceedings; he is not "disinterested" as a matter of law.  
19  
20

21 The Debtor knew that the Stipulated Order (which was entered nearly an entire month before the  
22 witness designation deadline) required that expert witnesses be *finally designated*, and should have  
23 investigated whether its expert witness could even pass the disinterested test contained in Bankruptcy  
24 Code § 327(a). Now, rather than live with the results of its own strategic decisions, the Debtor has filed  
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27  
28 <sup>1</sup> The Secured Lender took pains to ensure that a full conflicts check for all its witnesses, expert and non-expert, was completed and came back clear before the Secured Lender designated its own witnesses.

1 the Substitution in an attempt to give itself a “second chance” at designating an expert witness, more  
2 than two weeks after the Court-imposed deadline of such designation. That the Debtor failed to abide by  
3 clear dictates of the Court’s Stipulated Order does not now give the Debtor a “do-over” and a new  
4 opportunity to designate Mr. Holt. The parties agreed to, and this Court imposed, the deadline on *final*  
5 expert witness designations for a good reason – namely, that all parties to the confirmation proceedings  
6 be given ample notice of all expert witnesses that will testify against their positions. Essentially, if the  
7 Debtor is now permitted to “substitute” one expert for another at this late date – scarcely more than a  
8 month before the close of all discovery, the Debtor will have (through its own neglect) given itself a  
9 two-week head start on trial preparation ahead of the Secured Lender. That is unfair and is a prejudicial  
10 undermining of the Stipulated Order.  
11  
12

13 Accordingly, the Secured Lender objects to the Debtor’s “substitution” of Mr. Holt and  
14 respectfully requests that the Court enter an order prohibiting the Debtor from calling as an expert  
15 witness any person not already designated on the Debtor’s List. Mr. Holt was not designated in a timely  
16 manner. The Debtor’s failure to investigate obvious conflicts of interest should not be made to prejudice  
17 the Secured Lender.  
18

19 DATED this 25<sup>th</sup> day of April, 2000.

20 SQUIRE, SANDERS & DEMPSEY, L.L.P.

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